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Supreme Court, U.S.
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No. 00-6933 3

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

REMON LEE, — PETITIONER
(Your Name)

vs.

MIKE KEMNA, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

REMON LEE
(Your Name)

1115 EAST PENCE ROAD
(Address)

CAMERON, MISSOURI 64429-8804
(City, State, Zip Code)

N/A
(Phone Number)

60 pp

QUESTION(S) PRESENTED

1) DID THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERR BY AFFIRMING THE DISTRICT COURT"S DENIAL OF LEE'S PETITION FOR HABEAS CORPUS BECAUSE HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GRANT HIM A 19 HOUR CONTINUANCE TO CONTACT HIS THREE SUBPOENAED ALIBI WITNESSES WHO UNEXPECTEDLY DID NOT RETURN AFTER A LUNCH BREAK?

2) SHOULD A HEARING HAVE BEEN HELD ON THE HABEAS CORPUS TO AT LEAST CONSIDER THE TESTIMONY OF THE ALIBI WITNESSES TO THE EFFECT THAT THEY WERE TOLD BY A COURT PERSONNEL, TO LEAVE?

3) IN THE CIRCUMSTANCES IN REMON LEE'S CASE, WAS HIS FEDERAL VIOLATION REGARDING A DENIED REQUEST FOR A SHORT CONTINUANCE, PROCEDURALLY BARRED FROM FEDERAL COURT?

4) HAS REMON LEE MADE A SUBSTANTIAL SHOWING OF ACTUAL INNOCENCE ACCORDING TO THE **SCHLUP** STANDARD FOR HIS ALIBI WITNESSES TO BE EXPLORED FURTHER TO PREVENT A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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RULES

MISSOURI RULE 24.09 09

MISSOURI RULE 24.10 09

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 25, 2000

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 8, 2000, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[X] reported at 213 F.3d 1037 (8th Cir. 2000); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution reads in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime....[and] be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment of the United States Constitution reads in relevant part:

> No State shall....deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The testimony presented at Mr. Lee's state court trial was as follows: On the afternoon of August 27, 1992, Reginald Williams (age 18), and his friend William Sanders (age 15), were trying to start a moped in a yard, between 67th and 68th Street on Monroe, in Kansas City, Missouri. While they were there, an older model rusty orange (or red) and white truck drove up the street and went south on Monroe. The driver was the only person in the truck.

The truck pulled into a driveway and turned around. The truck drove very slowly back down the street, headed north. As the truck went north, it passed Williams and Sanders again The driver stared at Sanders and Williams for about two to ten seconds.

The truck parked on Monroe and stayed there for about 30 minutes. Eventually, a blue 1965 Chevy Nova came around the corner. The car stopped directly across from the truck. Utimately, someone fired six or seven shots into the driver's side of the blue car and ran behind the red truck and jumped in the passenger side of the truck. After the passenger got in, the truck sped off, leaving tire tracks in the street.

Steve Shelby, the driver of the blue Nova, died of penetrating injuries to the brain caused by gunshot wounds Seven bullets and nine shell casings recovered from the scene were all fired from the same .9 millimeter caliber semi-automatic weapon. No gun was ever recovered.

Later that day, Williams picked Petitioner Lee's photograph out of a photo lineup and identified him as looking like the driver of the truck, although he wanted to see the individual in person before he could be certain. Williams later identified Lee as the driver after viewing two videotaped lineups. Williams could not identify anyone as **the shooter**. Williams could only see the driver from the shoulders up and could not identify any distinguishing characteristics of the driver. Williams admitted that he **lied** to the people investigating this case. He also told Petitioner Lee's first defense counsel in a taped statement that Reggie Rhodes was **the driver**. Williams further stated on tape that he just agreed to whatever his friend said when giving a report to the police.

William Sanders, (age 15 at the time), also viewed a photo lineup on August 27, 1992. Prior to trial, Sanders made "no" identification of Mr. Lee or anyone else as the driver of the truck and said on direct examination that he was not "ever" able to identify the driver. On cross-examination however, Sanders claimed he could identify Mr. Lee as the driver.

Shelby's sister, Rhonda Shelby, said she saw Mr. Lee and Reginald Rhodes together near a red truck behind her duplex, at 6621 Askew, in Kansas City, around 8:00 p.m on August 26, 1992 She did not speak to the person she claimed was Mr. Lee. Later that night, Reginald Rhodes asked Rhonda about her brother.

Lynn Bryant lived at 6623 Askew on August 26, 1992 Bryant said she saw Mr. Lee and Rhodes outside her duplex on the evening of August 26, 1992. She said the person she thought was

Mr. Lee had an old orange truck and Rhodes asked Bryant if she had seen Shelby.

Petitioner Lee's prior counsel, Mr. Robert Calbi, and Mr. Calbi's investigator Fred Macon, testified on Mr. Lee's behalf that Reginald Williams gave Calbi a statement on April 23, 1993, in which Williams admitted he could not see the driver of the car well enough to identify him. Mr. Calbi also testified he gave Williams a lineup with Petitioner Lee's photograph in it and Williams could not identify Mr. Lee. Following Mr. Calbi's testimony, the court adjourned for the lunch break.

When the proceedings resumed following the noon break on February 24, 1994, defense counsel put Petitioner Lee on the witness stand to make a record regarding his right to testify. In the course of the questioning, counsel developed the fact that Mr. Lee's mother Gladys Edwards, his stepfather James Edwards, and sister Laura Lee, had come from the state of California to testify for Mr. Lee. Defense counsel had met with these witnesses on February 21, 1994 and had served each of them with a subpoena. Defense counsel assured the jury in opening statement, that these witnesses would testify Mr. Lee was in California at the time of the murder. Ms. Laura Lee and Mr. and Mrs. Edwards were at the courthouse from 8:30 until about 11:00 a.m., on February 24, 1994. All three of them left the courthouse at 11:00 and had not returned to the courthouse when the proceedings started after the lunch break. Mr. Lee and defense counsel did not know at that time why they had left. Although counsel claimed there was nothing he could do.

Petitioner Lee asked him to request a continuance for "a couple hours" to try and locate the witnesses. Mr. Lee told counsel he knew his parents had not returned to California because they had a religious activity planned that evening in Kansas.

Defense counsel moved for a continuance until the next morning, at Mr. Lee's request. Although the alibi witnesses were his sister, mother and stepfather, who had voluntarily come all the way from California to testify for Mr. Lee, the trial judge denied the continuance motion. In overruling the motion, the judge assumed Mr. Lee's family members had "abandoned" him In response to defense counsel's request to adjourn until the next morning, the court stated, "My daughter is going to be in the hospital all day....So I've got to stay with her....it's too bad. The Court will not be able to be here tomorrow to try the case." Defense counsel also asked if the case could be continued until the next Monday in light of the judge's personal commitment. The judge denied that request also, stating that he had another trial starting on Monday. Mr. Lee was able to call no further witnesses.

Mr. Lee later learned that his alibi witnesses had been told by an officer that their testimony would not be needed until the next day because the state's case would take up the remainder of the day (See affidavits Laura Lee, Gladys Edwards, and James Edwards, included).

The trial judge overruled Petitioner Lee's motions for judgment of acquittal at the close of the state's, and all the evidence. The jury found Mr. Lee guilty of Murder in the first

degree and Armed Criminal Action. On April 19, 1994, Senior Judge Anthony P. Nugent sentenced Petitioner Lee to concurrent terms of life without parole on the murder charge and thirty years on the other charge.

On November 21, 1994, Mr. Lee filed a timely pro se motion for postconviction relief pursuant to Missouri Supreme Court Rule 29.15. This motion was amended by appointed postconviction counsel, who also requested an evidentiary hearing. Mr. Lee's motions brought forth that he received ineffective assistance of trial counsel and was denied Due Process of Law (1) when trial counsel failed to call his co-defendant Reginald Rhodes to testify on his behalf at trial, and (2) when the trial court overruled his motion for continuance after Mr. Lee's alibi witnesses mysteriously did not return to the courthouse before they could be called to testify. The Rule 29.15 motion set forth the names of the three alibi witnesses and stated what their testimony would be. On August 21, 1995, Judge Thomas C. Clark overruled Mr. Lee's 29.15 motion without an evidentiary hearing. Petitioner Lee filed a timely notice of appeal.

The state appellate court, in denying any relief held that Mr. Lee failed to comply with Missouri Supreme Court Rule 24.09 which requires that motions for continuances be in "writing" and the trial court could have properly denied the Motion for Continuance on that basis. The state appellate court also held that Petitioner Lee failed to present the elements required by Missouri Rule 24.10, when a continuance is requested on the basis of an absent witness. The Missouri Court of Appeals went on to

rule on the merits of the continuance request and found that Mr. Lee could not show that the testimony of the absent witnesses was was so crucial that it is reasonably probable that a different outcome would have resulted and so prejudice was not shown.

Mr. Lee filed a habeas corpus petition under 28 U.S.C. 2254 alleging several errors including the Due Process violation for failing to grant the continuance. The United States District Court for the Eastern District of Missouri denied relief on the habeas petition holding Mr. Lee's claim procedurally defaulted with no showing of prejudice. The United States Court of Appeals for the Eighth Circuit granted a certificate of appealability on the trial court's denial of a continuance, and after briefs and oral argument, a majority of the panel affirmed the District Court's denial of the issue. United States District Chief Judge in Iowa, sitting by designation, gave a **19 page** dissent. The total opinion was 22 pages in length.

The Petitioner Remon Lee now petitions this Court to grant a Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

The U.S. Court of Appeals affirmed the District Court's denial of habeas corpus relief, however, one member of the panel gave a 19 page dissent (See Appendix A).

The Court held that the Missouri appeals court "rejected Lee's claim because his motion for continuance did not comply "with Rules 24.09 and 24.10 "and thus the claim was procedurally barred." (Appendix A, pg. 2). The Court further opined that Lee could not overcome the default and that he could not prove his innocence (Id., at pg. 3).

Missouri courts do deny motions for continuances because they fail to meet the standards of Missouri Rules 24.09 and 24.10 (See Appendix A, pgs. 10-11, for case cites). However, the cases decided thus far in Missouri have different circumstances than Mr. Lee's case. Missouri courts have yet to decide on whether a defendant must meet the stringent requirements of Rules 24.09 and 24.10 when alibi witnesses "mysteriously" disappear for no logical reason. Not one case decided thus far has dealt with the "sudden" or "unexplained absence" of a witness. In fact, the court in State v. McCarter, 820 S.w.2d at 589 noted that the denial of a continuance is proper "particularly [] where the factual basis for the motion was not a last minute or unexpected surprise." It hints that such a situation could excuse a failure to comply or relax compliance with the written requirements of Rules 24.09 and the contents of Rule 24.10.

It should be strongly noted that neither the trial prosecutor, the trial judge, the postconviction court, nor the attorney general on appeal, even hinted that Mr. Lee had failed to comply with any procedure or rule in light of the circumstances of the case. The state appeals court appears to have pulled their reason for denying relief (failure to comply with Rules 24.09 and 24.10) out of a hat. To suggest that the trial court "could" have denied Lee's continuance other than for the reasons the judge gave on the trial record was to totally disregard the circumstances of Lee's particular case. The judge's reasons for denying the continuance were:

> 1) he decided (without a trace of evidence) that Lee's witnesses "abandoned" him;
>
> 2) he refused to have court the next day because his daughter would be in the hospital; and,
>
> 3) he refused to hold over the trial until the following Monday because of another case slated for for that week.

These are the reasons the judge denied Lee's motion for continuance, not because of a failure to comply with any rules of court.

The state appeals court did not explain "how" Lee failed to meet the requirements of Rule 24.09 and 24.10. State v. Lee, No. WD 49456, Slip Op. at 5, Memorandum.

The panel decision by the U.S. Court of Appeals to deny relief goes against the grain of the very reason why the Court issued a Certificate of Appealability (Appendix E, "whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance"). The District

Court denied relief also because of Lee's alleged failure to fulfill Rule 24.09 and 24.10. The U.S. Court of Appeals knew in full, of the District Court's decision. They had the case files when they granted the appealability. If Lee's claim truly was barred from consideration in the federal courts and Lee could not overcome the bar, there was no real reason to grant an appeal, with the appointment of private counsel, Ms. E. Ann Wright, The Cox Law Firm, 1125 Grand Ave., Kansas City, MO 64106.

The panel decision also conflicts with other Eighth Circuit decisions, namely;

White v. Bowersox, 206 F.3d 776 (8th Cir. 2000) (holding that state procedural rules are not adequate to bar federal habeas claims when they are neither firmly established or readily ascertainable).

Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994) (holding that the failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court).

Weeks v. Bowersox, 106 F.3d 248 (8th Cir. 1997) (holding, the Petitioner's assertion "that he can produce evidence of his actual innocence that, if credited, would lift the procedural bar, the magistrate judge erred by denying [Petitioner's] petition without a hearing on his actual innocence claim").

Sloan v. Delo, 54 F.3d 1371, 1379 (8th Cir. 1995) cert. denied sub. nom., Sloan v. Bowersox, 516 U.S. 1056 (1996), (holding, that a state procedural rule is not an adequate and independent state law ground if it would "thwar[t] the assertion of federal rights").

Both the District Court and the Eighth Circuit's opinion overlooks precedent by this Court regarding procedural bar:

Ylst v. Nunnemaker, 501 U.S. 797 (1991) (holding, that if "the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review").

Davis v. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923) (holding, whatever requirements "the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice").

Both the District Court and the Eighth Circuit's opinion conflicts with other Circuit Courts of Appeal:

Smart v. Scully, 787 F.3d 816, 820 (2nd Cir. 1986) (holding that a state appellate court's application of the contemperaneous objection rule did not preclude habeas corpus review).

Christoffel v. United States, 190 F.2d 585, 594 (D.C. Cir. 1950). (Strict adherence to state procedural rule was "so lacking in fundamental fairness as to constitute a miscarriage of justice which should not be permitted to occur"; quoted by U.S. ex rel. Smith v. DiBella, 314 F. Supp. 446, 447 (E.D.N.Y. 1999).

Thus, this issue is debatable among reasonable jurists of other courts and jurisdictions as well as the very same Circuit which denied Mr. Lee's habeas writ.

The Petitioner's federally protected Constitutional rights to Due Process of Law has been violated in such a way that it rendered the entire state trial proceedings fundamentally unfair.

Mr. Lee contends that due to the circumstances in his case, (1) there is no procedural default barring federal habeas review of his continuance issue, (2) if there were a default, it is excusable because Lee did everything a Petitioner could do in state count to present his federal violation for the courts' review, and, (3) the alleged default would be excusable due to his actual innocence of the crime convicted of, pursuant to Schlup v. Delo.

And lastly, but certainly not least, this Court should

grant Certiorari because the U.S. Court of Appeals for the Eighth Circuit has established a different standard for showing actual innocence that is in direct conflict with this Court's holding in Schlup v. Delo, 115 S.Ct. ___ (1995). Specifically, the Eighth Circuit has stood on its own post-Schlup precedent holding that federal courts cannot consider "new evidence" of actual innocence presented by a petitioner if that evidence was available at the time of trial and could have been discovered through the exercise of due diligence. See Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996). In denying the present Petitioner Remon Lee's claim, the majority of the panel on the Eighth Circuit held:

> Lee has failed to make the required showing because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier.

(Appendix A, pg. 3). The United States District Court for the Eastern District of Missouri dealt with this erroneous standard by the Eighth Circuit when it granted habeas relief to Ellen Reasonover, a much publicized case, in Reasonover v. Washington, ___ F. Supp.2d ___ (E.D. Mo., August 1999). In a carefully drafted discussion, the Court pointed out that the Eighth Circuit's understanding of "new evidence" was in conflict with the Supreme Court's definition in Schlup v. Delo. It duly noted that the Supreme Court held that federal habeas courts should consider all of the evidence presented by a petitioner, not just evidence that was unavailable at the time of the trial.

The Eighth Circuit panel went on to say that even if Lee's

alibi testimony was new evidence, he "did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi." (Appendix A, pg. 3).

The Eighth Circuit's decision is wrong. Regarding whether the jury would have believed the Petitioner's witnesses over the state's witnesses, the Court of Appeals mistakes the state's case as a strong one, when in fact is was reasonably weak. At trial, one witness first testified to the prosecuting attorney and then defense counsel that he could "not" identify the Petitioner Remon Lee. Minutes later, he suddenly told the judge he could. Another witness admitted he "lied" when giving information about the case. The sister of the victim and her friend who testified Mr. Lee was in town the night before the crime, had limited visibility to the person they "said" was Lee. These are the "four prosecution witnesses" that according to the Court of Appeals, "refuted the alibi". Their testimony was only boosted by the fact that Mr. Lee's alibi witnesses weren't heard by the jury, as promised by defense counsel in opening statement. Under the circumstances, it is no surprise that the jury sided with the state in finding guilt beyond a reasonable doubt.

Had the jury heard the alibi testimony, given the shaky nature of the state witnesses' testimony, it is reasonable to believe that the jury would have acquitted Remon Lee. The full strength of the alibi witnesses has never been sought out.

The state postconviction court refused to grant a hearing so that the witnesses could be brought in for the court to measure their testimony according to law. Both the District Court and the U.S. Court of Appeals assumed without finding out, that Remon Lee's alibi witnesses would not be believed by the jury.

The Petitioner briefly notes that if the courts thus far have assumed that family members cannot give a believable alibi, then something is wrong with that reasoning. It creates the question: "who" then does make a good alibi witness? If someone goes to a public place and it is later discovered he needs an alibi for that period of time, no one may remember him. If he or she is with a friend, it could always be said that the friend would lie to save a friend. That brings one back to family members. The Petitioner submits that for a court to reject alibi witnesses because they are family members is not giving reasonable jurors the credit they rightly deserve.

Mr. Lee further submits that even under the strict standard set by the U.S. Court of Appeals, he could "not" have presented the alibi testimony earlier. Due to circumstances beyond his control, Mr. Lee could not have presented the witnesses to the jury. He was not allowed to bring them to a postconviction hearing even though the court was fully aware of the witnesses and what they would say and that they wanted to testify. The state appeals court denied Mr. Lee's appeal without his alibi witnesses' testimony having been tested in court. And finally, the District Court and the U.S. Court of Appeals rejected the "actual innocence" of Remon Lee without putting his alibi

witnesses to the test by ordering a hearing for them to appear in Court. (See Appendix F through I).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: November 3, 2000

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2406

Remon Lee, Appellant, v. Mike Kemna, Superintendent; Jeremiah (Jay) Nixon, Attorney General, State of Missouri, Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri. [PUBLISHED]

Submitted: March 13, 2000

Filed: May 25, 2000

Before MORRIS SHEPPARD ARNOLD and FAGG, Circuit Judges, and BENNETT,* District Judge.

PER CURIAM.

Remon Lee was tried in Missouri state court on charges of first degree murder and armed criminal action. During his trial, Lee's alibi witnesses failed to appear and Lee moved for a continuance until the witnesses could be brought to the courtroom.

*The Honorable Mark W. Bennett, Chief Judge, United States District Judge for the Northern District of Iowa, sitting by designation.

"A"

The continuance was denied and Lee was convicted and given a concurrent sentence of life without parole on the murder charge and ten years on the armed criminal action charge. The trial court denied Lee's motion for a new trial which alleged ineffective assistance of trial counsel and violation of his due process rights.

On direct appeal, Lee claimed his trial motion for a continuance and his postconviction motion for a new trial were improperly denied. The Missouri Court of Appeals found the continuance motion was properly denied because it did not comply with Missouri Supreme Court Rule 24.09, which sets out the required form of the motion, and Rule 24.10, which lists the required elements of the motion. The court also found the new trial motion was properly denied because Lee failed to produce evidence showing counsel was ineffective. Lee then filed a 28 U.S.C. § 2254 petition claiming the denial of his motion for a continuance violated due process. The district court denied Lee's habeas petition finding the claim procedurally defaulted. We granted a certificate of appealability on the question of whether denial of Lee's motion for a continuance was a due process violation.

Lee first argues he did not procedurally default his claim. We disagree. Federal habeas review is not available on Lee's due process claim if the Missouri Court of Appeals "rest[ed] [its decision] on a state law ground that is independent of the federal question and adequate to support the judgment," regardless of "whether the state law ground is substantive or procedural." Coleman v. Thompson, 501 U.S. 722, 729 (1991); accord Hall v. Delo, 41 F.3d 1248, 1249-50 (8th Cir. 1994). The Missouri Court of Appeals rejected Lee's claim because his motion for a continuance did not comply with Missouri Supreme Court Rules 24.09 and 24.10 and thus the claim was procedurally defaulted.

We reach the merits of Lee's procedurally defaulted claim only if he can show cause for his default and prejudice or actual innocence. See Wyldes v. Hundley, 69 F.3d 247, 253-54 (8th Cir. 1995). Lee claims his default should be excused because

trial counsel's failure to follow Missouri's motion rules constituted ineffective assistance of counsel. We reject Lee's claim because ineffective assistance of counsel must be presented to the state court as an independent claim before it can be used to establish cause for a procedural default. See id. at 253. Although Lee raised a claim of ineffective assistance in his postconviction motion for a new trial, he did not specifically allege failure of trial counsel to present properly the motion for a continuance. See id. (habeas petitioner must present to state court same specific claim of ineffective assistance made out in habeas petition). Thus, the Missouri courts had no opportunity to consider whether Lee's trial lawyer was ineffective for failing to present the motion properly and Lee cannot present that claim now. Because Lee has not shown cause for his default, we do not reach the issue of prejudice.

An actual innocence claim requires Lee to show "'new reliable evidence . . . not presented at trial'" establishing "'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" Id. at 254 (citations omitted). Lee has failed to make the required showing because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier. See Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996). Even assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi.

We affirm the denial of Lee's habeas petition.

BENNETT, Chief District Judge, dissenting.

As Justice Fortas observed, "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). "Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'"

Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 96-97 (1977) (Stevens, J., concurring)). With this view of the importance and purposes of a writ of *habeas corpus*, I am unwilling to condone what I believe was a conviction in Lee's case that violates "fundamental fairness." Furthermore, I do not believe that Lee's due process claim has been procedurally defaulted, as the majority concludes, even under the current status of federal *habeas* law, which, in my view, increasingly elevates tortuous and tangled procedural impediments over fundamental fairness. *See Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights" in *habeas corpus* actions). For these reasons, I must respectfully dissent.

To explain why I believe that the decision below must be reversed, I find that a more detailed discussion of the circumstances of this case is required. Lee was tried in Missouri state court on charges of first-degree murder and armed criminal action. At the opening of his trial, Lee's defense counsel promised the jury an alibi defense, complete with three alibi witnesses, who would establish that Lee was not in Kansas City, the location of the murder, on the day of the murder, but was instead in California. Indeed, the promised alibi witnesses—Lee's mother, stepfather, and sister—had voluntarily traveled from California to Missouri to testify on Lee's behalf at his trial and were present at the courthouse as trial began. Moreover, these witnesses were under subpoena and had previously met with defense counsel.

In its case in chief, the government presented the testimony of two witnesses who identified Lee as the getaway driver and two other witnesses who placed Lee in Kansas City within the twenty-four hours preceding the murder. However, the government presented no physical evidence linking Lee to the murder. On the Thursday morning before the state rested its case, Lee's alibi witnesses were present at the courthouse. However, following a lunch recess, the three witnesses could not be located. Lee's alibi witnesses have since provided affidavits in which they aver that

they left the courthouse only after being told by a court security officer that their testimony would not be needed until the following day, because the state's case would take up the remainder of the day. No judge of any stripe, state or federal, trial or appellate, has yet passed on the reason for the alibi witnesses' sudden disappearance from the courthouse just before Lee's defense was to begin.

Upon discovering that Lee's three alibi witnesses were not present in the courthouse after the lunch recess, Lee's counsel orally informed the court of that fact and requested that the court grant a continuance in order for him to attempt to secure the testimony of the witnesses. Trial counsel also informed the court that the witnesses were thought to be still in town, because Lee's mother and stepfather had plans to attend a religious activity in Kansas City that evening. The trial court announced that the trial could not be continued to the following day, Friday, because the judge intended to be at the hospital when his daughter had surgery. The trial court also informed the parties that the trial could not be continued to the following Monday, because the judge had another trial set to commence that day. The state trial judge concluded, without a scintilla of evidence or a shred of information as to why the alibi witnesses were absent, and without making any attempt to enforce the subpoenas for their attendance, that the alibi witnesses had "abandoned" Lee and his defense. As a result of the denial of Lee's oral motion for a continuance, no alibi defense was presented, and not surprisingly—indeed inevitably—Lee was convicted by the state court jury.

On direct appeal, the Missouri Court of Appeals affirmed the denial of Lee's motion for a continuance, concluding that the denial of the motion was proper, because Lee's counsel failed to comply with two Missouri Supreme Court Rules, Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the adverse party consents to an oral application. Rule 24.10 sets out the information that must be included in a motion for a continuance that is grounded on the absence of a witness. The state trial court, however, had not relied

upon either of these rules in denying Lee's motion for a continuance, nor had the state resisted the motion on these grounds.

In this action for *habeas corpus* relief, Lee asserts that the denial of his motion for a continuance violated his federal right to due process. The federal district court to which Lee's petition for *habeas corpus* relief was presented concluded from the reliance by the state court of appeals upon its procedural rules that Lee's due process claim was procedurally defaulted. Specifically, the court below concluded that the decision of the Missouri Court of Appeals was based on an adequate and independent state law ground, which bars federal *habeas corpus* review. The majority agrees, and concludes further that Lee cannot overcome this impediment, because Lee is unable to demonstrate either "cause and prejudice" or "actual innocence."

A federal court's review of a *habeas* petition is barred when a state court dismisses or rejects a prisoner's claims on adequate and independent state law grounds, unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). I concur with the majority's conclusions that Lee is unable to demonstrate "cause and prejudice" or "actual innocence." Lee cannot establish the necessary "cause," because he failed to raise before the state court his asserted "cause," which he alleges was his trial counsel's ineffective assistance in failing to follow Missouri's procedural rules for a continuance. *Wyldes v. Hundley*, 69 F.3d 247, 253 (1995), *cert. denied*, 517 U.S. 1172 (1996). I also agree that Lee cannot satisfy the demanding criteria of an "actual innocence" claim, because he has failed to offer new, reliable evidence of his innocence in light of which "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Knox v. Iowa*, 131 F.3d 1278, 1282 (8th Cir. 1997). If Lee had been allowed a short continuance and had been able to present his alibi defense, he might very well have been acquitted, but he might also have been convicted. While the evidence against Lee was not strong, I recognize that a jury would have been free either to accept or reject his alibi defense. Therefore,

I cannot find that Lee meets *Schlup*'s high hurdle of "actual innocence"—even though he may in fact be innocent.

I nevertheless dissent, because I do not believe that we need to reach the question of whether Lee can overcome denial of his due process claim on adequate and independent state law grounds. Rather, I find that the decision of the Missouri Court of Appeals did not rest on any such adequate and independent state law ground. Therefore, I would hold that federal *habeas* review is *not* precluded in this case.

A panel of this court recently discussed the nature of, and limitations to, the bar to federal *habeas* review provided by denial of a claim on an "adequate and independent state law ground" as follows:

> Procedural default of a claim under state law may constitute an independent and adequate state ground, *Harris v. Reed*, 489 U.S. 255, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." *Easter v. Endell*, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143 (1923).

White v. Bowersox, 206 F.3d 776, 780 (8th Cir. 2000).

The "adequacy" of a state procedure presents a question of federal law. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert. denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056 (1996). A state law rule is not "adequate" to defeat federal *habeas* review if the rule is "unclear," "thwarts the assertion of federal rights," is "confusing," or is not "firmly established and regularly followed." *Id.* at 1379-80; *see also White*, 206 F.3d at 780 (to be "adequate" to bar federal *habeas* review, a rule must be "firmly established, regularly followed, and readily ascertainable"). A state law ground is not "independent" if it is in any way "linked to or dependent on any federal law." *Easter*, 37 F.3d at 1345. I have no trouble joining the majority's implicit conclusion that the state procedural rules at issue here, Missouri Supreme Court Rules 24.09 and 24.10, are not "linked to or dependent on any federal law," and thus constitute "independent" state law grounds for denial of Lee's motion for a continuance. However, I strenuously disagree that these rules present any "adequate" state law ground to bar federal *habeas* review of Lee's due process claim.

In some recent decisions, this court has found certain state procedural rules were not "adequate" to bar federal *habeas* claims. In *White*, this court concluded that the petitioner was denied a fair opportunity to seek relief in his case, because the procedural rule that barred his second amended petition for state post-conviction relief was neither firmly established nor readily ascertainable. *White*, 206 F.3d at 780. The court found that the Missouri Supreme Court had introduced for the first time in White's post-conviction proceedings two limitations on a recently-recognized remedy for attorney abandonment of a petitioner in post-conviction proceedings. *Id.* at 781. However, this court found that neither limitation could reasonably have been anticipated in advance of its application in the petitioner's case. *Id.* at 781. Importantly, the court held that whether or not a limitation was "implicit in, and correctly derived from, Missouri's prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence." *Id.* (citing *Ford*, 498 U.S. at 423). Therefore, "even if . . . th[e state] rule forms a

consistent pattern with prior [state] precedents, we could not apply it as a procedural default in this [*habeas*] case."

Similarly, in *Easter*, this court concluded that Rule 37 of the Arkansas Rules of Criminal Procedure did not meet the due process requirement of "adequacy" to bar a federal *habeas* claim. *See Easter*, 37 F.3d at 1345-46. The rule in question reinstated state post-conviction relief proceedings and set deadlines for the filing of state actions for such relief. *Id.* at 1344. In *Easter*, although this court concluded that Rule 37 otherwise provided constitutionally adequate procedures, it nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter." *Id.* at 1346. This court reiterated that conclusion in *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995), holding,

> As in *Easter*, the state has not demonstrated that Pearson was put on notice that he had a Rule 37 remedy before his filing deadline passed. The availability of Rule 37 was not firmly established when Pearson needed to pursue it. Accordingly, Pearson's Rule 37 default is not adequate to support a denial of federal review of the merits of Pearson's constitutional claims.

Pearson, 52 F.3d at 742.

The state procedural rules that purportedly stand as bars to Lee's federal *habeas* due process claim are Missouri Supreme Court Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the opposing party consents to an oral application. Missouri Supreme Court Rule 24.10 states that a motion for a continuance, written or oral, based on the absence of a witness must state specific matters, including the materiality of the evidence and diligence to obtain it, reasonable grounds for belief that the attendance of the witness can be obtained within a reasonable time, the facts the witness will prove and that no

other person who could have been procured for trial can prove those facts or prove them so fully, the applicant's good faith. and that the witness is not absent by the connivance, consent, or procurement of the applicant. The Missouri Court of Appeals has explained that "the reason for this rule is obvious, it permits the trial court to pass on the merits of the request." *State v. Robinson*, 864 S.W.2d 347, 349 (Mo. Ct. App. 1993). However, to determine the "adequacy" of the bar to federal *habeas* claims raised by these rules, I must determine whether the application of these rules by Missouri appellate courts to the circumstances presented when Lee moved for a continuance based on the sudden absence of his alibi witnesses in the midst of his trial was firmly established, regularly followed, or readily ascertainable. *White*, 206 F.3d at 780.

I acknowledge that Missouri appellate courts have routinely held that "[f]ailure to comply with Rules 24.09 and 24.10 alone is sufficient to sustain the trial court's ruling" denying a continuance. *See, e.g., State v. Dodd*, 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) (treating a motion for a continuance that was not accompanied by an affidavit as an oral motion to which the state had not consented); *accord Robinson*, 864 S.W.2d at 349 (stating failure to comply with Rule 24.09 was sufficient to deny a request for a continuance, citing *State v. Diamond*, 647 S.W.2d 806, 808 (Mo. Ct. App. 1982)); *State v. Lopez*, 836 S.W.2d 28, 32 (Mo. Ct. App. 1992) (citing non-compliance with either rule, and stating "[d]efendant's failure to request the continuance by written motion accompanied by an affidavit is sufficient grounds to affirm the trial court's ruling"); *State v. Fuller*, 837 S.W.2d 304, 306 (Mo. Ct. App. 1992) ("The failure to comply with rules prescribing means for requesting a continuance is sufficient grounds to deny the request.") (citing cases); *State v. Anderson*, 785 S.W.2d 299, 302 (Mo. Ct. App. 1990) ("We agree that the defendant's failure to request the continuance by a written motion accompanied by an affidavit is sufficient ground for this court to affirm the trial court's ruling," thus relying on failure to meet the requirements of Rule 24.09, but finding "[m]ore important" was non-compliance with the requirement of Rule 24.10 that the personal presence of the witness could reasonably be obtained); *State v.*

Fletcher, 758 S.W.2d 476, 478 (Mo. Ct. App. 1988) ("'Defendant's failure to file the request in writing accompanied by an affidavit showing good cause as required by Rule 24.09 is sufficient ground to affirm the trial court's action.") (quoting *Diamond*, 647 S.W.2d at 808); *State v. Gasaway*, 720 S.W.2d 3, 5-6 (Mo. Ct. App. 1986) ("Where a defendant fails to comply with Rule 24.10, the trial court does not abuse its discretion in denying a continuance.").

I acknowledge further that Missouri appellate courts have routinely affirmed denials of oral motions for continuances that were prompted by the absence of a witness when the motions were made at or near the time of trial, or even during trial, on the ground that the motions did not comply with Rule 24.09 or Rule 24.10. *See State v. Wolfe*, 13 S.W.3d 248, 261 (Mo. 2000) (*en banc*) (affirming denial of an oral motion for continuance made in the course of trial after the trial court's denial of a motion to introduce an affidavit by the absent witness); *Dodd*, 10 S.W.3d at 555 (not indicating precisely when the oral motion for continuance was made, although it was apparently made in proximity to or during trial, and affirming denial of the motion); *Robinson*, 864 S.W.2d at 348 (affirming denial of a motion for continuance pursuant to Rules 24.09 and 24.10 made at "docket call" three days before trial); *Lopez*, 836 S.W.2d at 31-32 (affirming denial of an oral motion for a continuance based on the absence of a witness apparently made on the second day of trial as an alternative to a request for late endorsement of another witness); *Fuller*, 837 S.W.2d at 306 (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the day of trial); *State v. McCarter*, 820 S.W.2d 587, 588 (Mo. Ct. App. 1993) (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the morning of trial); *Anderson*, 785 S.W.2d at 302 (affirming denial of an oral motion made on the day of trial); *Fletcher*, 758 S.W.2d at 478 (affirming denial of an oral motion for a continuance made "[a]fter the jury was seated"); *Gasaway*, 720 S.W.2d at 5 (affirming denial of an oral motion for a continuance made on the third day of trial); *Smith*, 633 S.W.2d at 416 (affirming denial of an oral motion for a continuance made "at the close of trial, before submission to the jury").

However, in *not one* of these cases was the absence of the witness sudden or unexpected. *Wolfe*, 13 S.W.3d at 261 ("Defense counsel told the judge that she had been trying to contact the [absent witness], but no one had seen her in weeks" and "[t]he State replied [to the motion for continuance] that it also could not find the [absent witness]."); *Dodd*, 10 S.W.3d at 555 (both the state and the defendant had attempted to subpoena the absent witnesses for prior proceedings and the defendant "conceded in his motion that he had not been able to locate the [absent witnesses] for several months before his trial"); *Robinson*, 864 S.W.2d at 348 (in premature reliance on a plea agreement that fell through, the defendant had not availed himself of the opportunity to depose the state's witnesses, even though the state had made those witnesses available); *Lopez*, 836 S.W.2d at 31-32 (nothing indicated the absence of the witness was a surprise); *Fuller*, 837 S.W.2d at 306 (the absent witness "had been missing for more than a year, despite extensive efforts to locate her by both sides"); *McCarter*, 820 S.W.2d at 588-89 (in the oral motion, defendant alleged that the absent witness had not been located, had left town, and had no exact address at which he could be located, and counsel stated further that "[w]e are not sure if we can . . . find this man," and the court concluded that the motion was "insufficient on the matter well known before trial" and "the factual basis for the motion was not a last minute or unexpected surprise"); *Anderson*, 785 S.W.2d at 302 (it appeared that the absent witness "had fled the jurisdiction and that a 2-year effort to locate her had been unsuccessful"); *Gasaway*, 720 S.W.2d at 5 (although the oral motion for continuance was made on the third day of trial, the absent witness, who had appeared pursuant to a subpoena on the first day, had been absent the second day of trial, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness); *Smith*, 633 S.W.2d at 416 (trial counsel had not shown "due diligence in securing the attendance of the witness, or his testimony by deposition for a year before trial," even though the testimony the absent witness was intended to impeach was known to counsel for about a year before trial). The situation was slightly different in *Fletcher*:

> Counsel stated that she was not aware of two of the potential alibi witnesses until a very short time ago. She was unaware of the third until the morning of the trial. The defendant stated he expected an alibi witness to appear but she had been subpoenaed to a child support hearing and could not appear.

Fletcher, 758 S.W.2d at 478. Nevertheless, the absence of the alibi witnesses in that case appeared to have more to do with lack of diligence than sudden and unexpected absence of a witness who had already presented himself or herself at the time of trial. *See id.*

Indeed, the reliance in all of these decisions on the defendant's prior knowledge of the unavailability of the witness, or circumstances that should have suggested to counsel that the witness would be unavailable at trial, implies that a truly unexpected absence of a witness, as occurred in this case, might excuse failure to comply or relax compliance with the written motion requirements of Rule 24.09 and the content requirements of Rule 24.10. *See, e.g., McCarter*, 820 S.W.2d at 589 (specifically noting that failure to comply with the requirements of Rule 24.09 was sufficient grounds to deny a motion for continuance, stating that this was "particularly true where the factual basis for the motion was not a last minute or unexpected surprise").

Thus, I do not find that the application of Rules 24.09 and 24.10 was "firmly established" or "regularly followed" in the circumstances in which Lee made his motion for continuance, that is, circumstances involving the sudden and unexplained absence of alibi witnesses who had been in attendance just prior to a recess after which their testimony was required and who were under subpoena to appear at that time. *Cf. White*, 206 F.3d at 780 (the limitations on the newly-recognized claim of attorney abandonment were introduced only in the petitioner's case, and therefore were not "firmly established" at the time his claim was denied on the basis of those limitations); *Pearson*, 52 F.3d at 742 ("The availability of Rule 37 [of the Arkansas Rules of

Criminal Procedure] was not firmly established when Pearson needed to pursue it."); *Easter*, 37 F.3d at 1346 (Rule 37 of the Arkansas Rules of Criminal Procedure otherwise provided constitutionally adequate procedures, but nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter").

Moreover, the possibility that application of Rules 24.09 and 24.10 to the circumstances presented in Lee's case was somehow "implicit in, and correctly derived from, Missouri's prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures," is not sufficient to bar his federal *habeas* claims, because those rules "should not be applied as a procedural default if the defendant could not be deemed to have been apprised of" their applicability. *White*, 206 F.3d at 780 (citing *Ford*, 498 U.S. at 423). The circumstances in which Lee moved for a continuance make it particularly unlikely that he could be deemed to have been apprised of the applicability Rules 24.09 and 24.10. As a practical matter, it is simply unrealistic to suppose that, when confronted during trial with the sudden and unexplained absence of witnesses who have previously been in attendance, both voluntarily and under subpoena, counsel will be able to produce a written motion, supported by an affidavit, as required by Rule 24.09, detailing expressly the information required by Rule 24.10. Indeed, it appears that neither the trial judge, Lee's counsel, nor opposing counsel considered the applicability of these rules in the circumstances, although the Missouri Court of Appeals later relied upon them to affirm the trial court's denial of a continuance. Therefore, I would hold that applicability of these rules in Lee's circumstances was not only not "firmly established" or "regularly followed," it was not "readily ascertainable." *Id.*

There are yet more grounds on which I would hold that failure to comply with Rules 24.09 and 24.10 does not constitute an "adequate and independent state law ground" for denial of federal *habeas* review. I would also hold that application of these rules in Lee's circumstances stands as no bar, because the rules would "thwar[t] the

assertion of federal rights" in the circumstances of this case. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert. denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056 (1996). In *Henry v. Mississippi*, 379 U.S. 443 (1965), the United States Supreme Court held that a state procedural ground was "adequate" to preclude federal review of a constitutional claim only if it outweighed the strong federal interest in hearing federal claims. *Henry*, 379 U.S. at 447; *cf. Sykes*, 433 U.S. at 88-90 (holding Florida's "contemporaneous objection rule" to be an adequate state ground based on the important state interests it serves). A review of case law reveals instances in which federal courts have found the state interest furthered by the rule in question was not adequate to bar federal *habeas* claims, because that state interest had already been fulfilled. *See Smart v. Scully*, 787 F.2d 816, 820 (2d Cir. 1986); *see also Caston v. Costello*, 74 F. Supp. 2d 262, 274 (E.D.N.Y. 1999) (holding that a state appellate court's application of the "contemporaneous objection rule" did not preclude *habeas* review); *United States ex re. Smith v. DiBella*, 314 F. Supp. 446, 447 (D. Conn. 1970) (holding that rigid adherence to a state procedural rule, which required an appellant to submit a motion to correct a trial court's findings within two weeks after the findings are filed, was "so lacking in fundamental fairness as to constitute 'a miscarriage of justice which should not be permitted to occur.'") (quoting *Christoffel v. United States*, 190 F.2d 585, 594 (D.C. Cir. 1950)).

This line of authorities is exemplified by the decision of the Second Circuit Court of Appeals in *Smart*, 787 F.2d 816. In *Smart*, a petitioner prosecuting his *habeas* action *pro se* sought federal review on the ground that his incompetence at the time he entered his guilty plea had rendered his guilty plea involuntary. *Id.* at 817. In response, the state asserted that the petitioner had procedurally defaulted, because he had not sworn to his allegations of fact, as required by state procedure. *Id.* at 818. The district court denied the petition on the ground that the failure to include sworn allegations constituted procedural default. *Id.*

The Second Circuit Court of Appeals, however, reached the merits of the petitioner's claim, finding that the state court's denial was not based on an "adequate and independent" state ground warranting federal refusal to consider the federal issues. *Id.* at 820. The appellate court reasoned that the state interest in having petitioners swear to their allegations of fact was not sufficient to preclude federal consideration of the petitioner's *habeas* claim, because the petitioner's pleading, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead." *Id.* The court reasoned further that "Smart's type of error does not at all implicate the concerns expressed in [*Wainwright v. Sykes*, 433 U.S. 72 (1977)]," which related to improper diminution of "the significance of the state proceeding as the appropriate forum for the adjudication of all claims in a state criminal prosecution" to obtain some "strategic advantage." *Id.* at 820-21. Instead, the court could "perceive of no tactical benefit to be derived from Smart's failure," where "[h]is noncompliance with a threshold requirement of post-conviction relief caused him to suffer dismissal of his motion without providing any opportunity for a favorable outcome." *Id.* at 821. Thus, the appellate court in *Smart* found that this was not a situation in which a defendant "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief." *Id* at 821.

Likewise, I can perceive of no situation under which Lee "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief." *Id.* Here, Lee informed the court of all the information he had regarding his witnesses' surprising disappearance. Given the three witnesses' sudden, unexplained absence from the courthouse during the middle of a trial day, it is impossible to imagine that counsel could have done more to meet the requirements of Missouri Supreme Court Rules 24.09 and 24.10.

Furthermore, it is difficult to understand what part of Rule 24.10 was not satisfied, either by counsel's representations at the time he moved for a continuance or

by the circumstances otherwise known to the court; therefore, the trial court was notified of the grounds for the motion for a continuance and was given a clear opportunity to address its merits. *Cf. Smart*, 787 F.2d at 820 (the petitioner's pleadings, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead," and thus non-compliance with the state procedure was not an "adequate and independent state ground" to bar *habeas* claims). The materiality of the testimony of alibi witnesses in Lee's case was obvious, when counsel had detailed in his opening statements that the alibi witnesses would testify that Lee was in California, not Kansas City, at the time of the murders, and the diligence of the applicant in attempting to obtain the presence of the witnesses was equally apparent, because the witnesses had previously been present and were under subpoena. *See* MO. SUP. CT. R. 24.10(a). Counsel's representation that he believed the witnesses were still in town, because they intended to attend a religious service, in my opinion, established reasonable grounds for belief that the attendance of the witnesses could be procured within a reasonable time. *See* MO. SUP. CT. R. 24.10(b). Counsel's indication in his opening statement of the critical content of the alibi witnesses' testimony adequately indicated what facts the witnesses would prove, and it should have been obvious that no other testimony could adequately establish Lee's alibi defense. *See* MO. SUP. CT. R. 24.10(c). Counsel's representations that the witnesses had been present at the courthouse before the lunch recess and that he had no idea why they had not returned was sufficient, in my view, under the circumstances, to satisfy the requirements of the rule that the witnesses not be absent by connivance, consent, or procurement of the applicant, and that Lee was seeking a continuance in good faith and not simply for purposes of delay. *See* MO. SUP. CT. R. 24.10(d).

However, after quoting the provisions of the rule, the Missouri Court of Appeals stated only, "After a careful review of the record, we find appellant's motion was made without the factual showing required by Rule 24.10," and that denial of a motion based on a deficient application was not an abuse of discretion." *State v. Lee*, No. WD

49456, slip op. at 5 (Memorandum Supplementing Order Affirming Judgment Pursuant To Rule 84.16(b) and 30.25(b)). Thus, the court that relied on Rule 24.10 failed to specify in what respect Lee's motion for a continuance owing to the sudden absence of alibi witnesses was deficient. Furthermore, as I believe any seasoned trial lawyer would agree, requiring that a motion for a continuance be in writing, with supporting affidavits, as required by Rule 24.09, when the motion is made in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings.

It must be remembered that these three witnesses had voluntarily traveled from California to Missouri for Lee's trial and had been present, and apparently ready and willing to testify on Lee's behalf, that very morning. Moreover, Lee's witnesses' affidavits raise a serious factual issue, which no court has addressed, as to whether state action was responsible for the disappearance of the witnesses from the courthouse in the middle of the day on which their testimony was required. The trial court, however, did not even attempt to enforce the subpoenas for these witnesses or otherwise attempt to ascertain why they were suddenly absent. *Cf. Gasaway*, 720 S.W.2d at 5 (the oral motion for continuance was not denied until the day after the absence of the witness under subpoena was discovered, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness).

In short, this is not a case in which Lee was "sandbagging" the state trial court in a strategic maneuver to forgo adjudication of issues in state court while embedding in the record a ground for future federal habeas corpus relief. *See Smart*, 787 F.2d at 821 (considering whether the petitioner's non-compliance with state rules is simply an attempt to embed in the state record a basis for possible future habeas relief). Rather, Lee effectively placed the state court on notice as to the grounds for his motion for a continuance such that the state court had the opportunity to address the merits of his request. *Id.* at 820 (mere non-compliance with state rules should not preclude federal

review, where the petitioner's defective motion nevertheless gave the state court a clear opportunity to address his contentions). I conclude that, under these unique circumstances, Lee's failure to comply fully with Missouri Supreme Court Rules 24.09 and 24.10 is insufficient to preclude federal consideration of Lee's habeas claim. *See id.* at 820-21. Rather, strict compliance with these rules would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Sloan*, 54 F.3d at 1379.

To put it another way, applying these rules in the circumstances of Lee's case is not "fundamentally fair." *Engle*, 456 U.S. at 126; *accord Strickland v. Washington*, 466 U.S. 668, 697 (1984) (observing that "fundamental fairness is the central concern of the writ of habeas corpus"); *Sykes*, 433 U.S. at 96-97 (Stevens, J., concurring) (measuring the appropriateness of *habeas corpus* relief against a "fundamental fairness" standard). It is instead rampant elevation of procedure over substance. *Cf. Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting) (decrying the elevation of procedural impediments to vindication of federal rights in *habeas corpus* actions). We must not lose sight of the underlying principle behind the bar raised by an "adequate and independent state law ground," which is "'that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court.'" *White*, 206 F.3d at 780 (quoting *Easter*, 37 F.3d at 1347). The procedural rules raised as a bar here provided Lee with no such fair opportunity, in the circumstances of his case, to obtain a continuance and mount his alibi defense.

This case, in no small measure, reflects the current status of federal *habeas corpus* jurisprudence. Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles, *see Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (Stevens, J., concurring in the judgment) ("The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in

a procedural maze of enormous complexity."), notwithstanding that the Supreme Court once recognized that "habeas corpus is not 'a static, narrow, formalistic remedy . . . but one which must retain the 'ability to cut through barriers of form and procedural mazes.'" *Hensley v. Municipal Court, San Jose Milpitas Jud. Dist., Santa Clara County, Cal.*, 411 U.S. 345, 349-350 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), and *Harris v. Nelson*, 394 U.S. 286, 291(1969)). This large and increasingly complex web has now virtually obscured the core purpose of the Writ.

Not only has this procedural web taken on a life of its own, it has developed its own unique nomenclature, a procedural cant further obscuring the merits of most *habeas corpus* actions: Rather than addressing the underlying merits of the constitutional claims asserted by a petitioner for *habeas corpus* relief, opinions in *habeas* actions are now riddled (in both the primary and secondary sense of the word) with terms like "procedural default," "cause and prejudice," "abuse of the writ," "successive petitions," "mixed petitions," "adequate and independent state law grounds," "the 'look through' presumption," "the total exhaustion rule," "state waiver of the exhaustion defense," "non-retroactivity," "non-cognizable constitutional claims," "fairly presented claims," "unintended claims," "objective factors external to the defense," and "the presumption of correctness." The vast majority of federal *habeas* petitioners find themselves entangled in this omnipresent and perplexing procedural web, which effectively precludes federal courts from ever reaching the merits of their constitutional claims. For example, when the Third Circuit Court of Appeals recognized that a case before it "illustrate[d] the complexity engendered by the current federal habeas corpus doctrine of procedural default," *Hull v. Feeman*, 991 F.2d 86, 88 (3d Cir. 1993), the court also expressed its concern that its method for breaking free of the procedural web, so that it could reach the merits of the petitioner's claim, might instead "have placed [the petitioner] into an enclosed loop from which he cannot escape." *Id.* at 94 n.6.

With the inevitable focus on this bewildering array of convoluted procedural obstacles, it is all too easy to look past some crucial, simple truths. First, the mystifying procedural web most often traps and snares all but the most sophisticated or just plain lucky petitioners, and Lee is neither. Second, there is a reasonable possibility that Lee is in fact innocent. The case against him, based primarily on shaky eye-witness testimony with no corroborating physical evidence, was not strong. Third, his state court conviction was virtually assured by the trial judge's denial of his oral motion for a short continuance, because he was thereby precluded from presenting his alibi defense. The prejudicial effect of the denial of his motion for a continuance is especially apparent in light of defense counsel's promise, in his opening statement, to present an alibi defense and witnesses. Fourth, the trial court's summary denial of a continuance—on grounds that appear to me to be unreasonable and completely arbitrary, and hence fundamentally unfair, in the circumstances presented and in the face of a justifiable request for a brief delay—most probably amounts to an unconstitutional denial of due process. *See, e.g., McMiller v. Lockhart*, 915 F.2d 368, 372 (8th Cir. 1990) (a *habeas* petitioner's due process claim founded on denial of a motion for continuance of his criminal trial was judged against "fundamental fairness" and "abuse of discretion" standards, in light of the circumstances of the case), *cert. denied*, 498 U.S. 1108 (1991); *White v. Lockhart*, 857 F.2d 1218, 1220 (8th Cir. 1988) (where the *habeas* petitioner asserted a due process violation in the trial court's refusal to continue his criminal trial, the court noted that "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of justifiable request for delay"' rises to the level of a constitutional violation," quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), and stating that, to prevail, the petitioner "must show that in denying his request for a continuance the district court acted in a manner 'so egregious that it was fundamentally unfair,'" quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)); *Loggins v. Frey*, 786 F.2d 364, 366-67 (8th Cir.) (where a *habeas* petitioner asserts a violation of due process based on denial of a continuance, "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay"'. . . . may give rise to a violation of due process") (quoting *Morris*,

461 U.S. at 11-12, in turn quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)), *cert. denied*, 479 U.S. 842 (1986). Lastly, it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case.

In sum, I would reverse the decision of the district court. I would hold that there is no procedural default, because there is no "adequate and independent state law ground" barring federal *habeas* review. Consequently, I would remand this *habeas* action for an evidentiary hearing on Lee's claim that he was denied due process when the state trial court refused to grant him a continuance in order to permit him to secure the testimony of his three subpoenaed alibi witnesses. The district court should have the first opportunity to decide the merits of Lee's federal constitutional claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNIT_ STATES COURT OF APP_ _S

FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

Remon Lee,

Appellant,

v.

Mike Kemna, et al.,

Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

August 8, 2000

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

"D"

UNI_ _ STATES COURT OF A_ _ALS

FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

Remon Lee,

Appellant,

vs.

Mike Kemna, et al.,

Appellee.

Appeal from the United States District Court for the Western District of Missouri

The appplication filed by Mr. Lee for a certificate of appealability in the above-referenced case has been considered by the Court and is hereby granted. A certificate is issued on the question of whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance.

September 30, 1999

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

"E"

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FILED
APR 19 1999
U. S. CLERK, KCMO
U. S. DISTRICT COURTS
WEST. DISTRICT OF MISSOURI

REMON LEE,)
)
Petitioner,)
)
vs.) Case No. 98-0074-CV-W-6-P
)
MIKE KEMNA,)
)
Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his 1994 conviction for first degree murder and the sentence of life imprisonment without parole pursuant thereto, which were entered in the Circuit Court of Jackson County, Missouri.[1] Petitioner raises seven (7) grounds for relief, all of which respondent contends are procedurally barred from federal habeas corpus review because petitioner did not present them in his consolidated direct appeal and appeal from denial of state post-conviction relief pursuant to Mo. Sup. Ct. R. 29.15. See Respondent's Exhibit 7; State v. Lee, 935 S.W.2d 689 (Mo. Ct. App. 1996) (per curiam). Respondent further contends that petitioner's claims are without merit.[2]

Petitioner raised only two points in his consolidated appeal brief: (1) the trial court erred in overruling his motion for a continuance after his alibi witnesses disappeared from the courthouse before they were to testify; and (2) his trial counsel was ineffective for failing to call petitioner's co-defendant at trial and when the trial court overruled defense counsel's motion for a continuance after petitioner's alibi witnesses disappeared without testifying. Respondent's Exhibit 7, pp. 7-10.

Petitioner raises the following grounds for relief in this federal petition: (1) he was forced against his will to accept an appointed attorney not of his own choosing because he wanted to retain a different attorney when his previously retained attorney withdrew from the case; (2) the trial judge was biased against him based on three specific instances of conduct or comments; (3) the prosecutor committed misconduct by tricking petitioner's alibi witnesses into leaving the courthouse, rushing her case to a close, and commenting to the jury on the absence of the alibi witnesses; (4) the evidence was insufficient to support his convictions; (5) his sentence is constitutionally disproportionate to that of his co-defendant who actually shot the victim; (6) the trial court violated due process by failing to grant him a continuance when his alibi witnesses disappeared from the courthouse and in not allowing him to present his co-defendant's testimony; and (7) the cumulative effect of all the errors rises to the level of a constitutional violation.

Procedural Default – Grounds 1-5 and 7

A review of the record demonstrates that petitioner procedurally defaulted Ground 1 by failing to raise it in his pro se or amended Rule 29.15 motions or in his consolidated appeal brief. Respondent's Exhibits 6 and 8. Grounds 2, 3, 5, and 7 were procedurally defaulted by petitioner's failure to raise them in his motion for new trial or in his consolidated appeal brief. Respondent's Exhibits 5 and 7. Ground 4 also was not raised in petitioner's consolidated appeal brief. Respondent's Exhibit 7.

In Coleman v. Thompson, 501 U.S. 722 (1991), the Supreme Court held:

In all cases in which a state prisoner has defaulted his federal claims in state court

[1]Although petitioner does not state that he challenges his conviction and concurrent ten-year sentence for armed criminal action, the Court notes its existence. See Respondent's Exhibit 9.

[2]Because the Court agrees that petitioner procedurally defaulted Grounds 1-5 and 7, a review of the merits of those claims is unnecessary and inappropriate.

Document # ——— "B"

> pursuant to an independent and adequate procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Cause, actual prejudice, and the probability of a "fundamental miscarriage of justice" are to be judged under criteria set out in Wainwright v. Sykes, 433 U.S. 72 (1977), and Murray v. Carrier, 477 U.S. 478 (1986). Coleman, 501 U.S. at 748-50.

Petitioner contends that either trial counsel's or appellate counsel's ineffectiveness caused his state procedural default of Grounds 1-5 and 7 and that he is actually innocent of the crimes as evidenced by the affidavits of his mother, stepfather, and sister that he could not have committed the crimes in question because he was with them in California during August, 1992. Doc. Nos. 6 and 12. Petitioner also contends that an officer of the court caused his alibi witnesses to leave the courthouse before they were called to testify.

Petitioner cannot allege ineffective assistance of direct appeal counsel as cause for his state procedural default because he has failed to exhaust such a claim independently in the state courts as he must do before it can be used to establish cause under Murray v. Carrier, 477 U.S. at 489. See Hall v. Delo, 41 F.3d 1248, 1250 (8th Cir. 1994); McKinnon v. Lockhart, 921 F.3d 830, 832 (8th Cir. 1990), cert. denied, 501 U.S. 1208 (1991).

Moreover, ineffectiveness of his Rule 29.15 trial or appellate counsel cannot constitute legally sufficient cause for his default because there is no constitutional right to effective assistance of counsel in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. at 752; Oxford v. Delo, 59 F.3d 741, 748 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996).

Petitioner also has failed to demonstrate that an officer of the court caused his alibi witnesses to leave without testifying. See Respondent's Exhibit 8, pp. 12-17. All of his three alibi witnesses

were family members whose explanation for their disappearance at trial was available to petitioner or "discoverable through the exercise of due diligence" during the pendency of petitioner's direct appeal and/or state post-conviction proceedings. Thus, petitioner cannot meet the burden of 28 U.S.C. § 2254(e)(1) and (2) to show that the reason he did not develop the factual basis for his Grounds 3 and 6 in the state courts was because the claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or that they rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." Moreover, petitioner also has the burden of demonstrating that "the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Petitioner has failed to meet the above standards regarding his failure to present the affidavits of his three proposed alibi witnesses to the state courts. Therefore, those affidavits cannot be considered in this federal habeas corpus proceeding. See Weeks v. Bowersox, 119 F.3d 1342, 1354 n.12 (8th Cir. 1997), cert. denied, __ U.S. __, 118 S.Ct. 887 (1998); Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996).

Not only has petitioner failed to demonstrate cause for his state procedural default, he also has failed to show that he is "probably actually innocent" of the crimes for which he was convicted. Bowman v. Gammon, 85 F.3d 1339, 1346 (8th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 1273 (1997). Therefore, further review of Grounds 1-5 and 7 is not required to prevent a fundamental miscarriage of justice. Murray v. Carrier, 477 U.S. at 495.

Trial Court Error in Denying Continuance and in Not Allowing the Testimony of Accomplice – Ground 6

In Ground 6, petitioner contends that the trial court violated his right to due process by not granting his motion for a continuance when his alibi witnesses disappeared from the courthouse and by not allowing him to present the testimony of his co-defendant. Respondent contends that petitioner's claim concerning a continuance is procedurally defaulted because petitioner only made a perfunctory citation to the United States Constitution in his Point I on appeal and relied solely on a state law theory of abuse of discretion in his argument. Respondent's Exhibit 7, pp. 7-8, 11-17. The Missouri Court of Appeals held that the motion for a continuance did not meet the requirements of Mo. Sup. Ct. R. 24.10 and that petitioner failed to demonstrate a reasonable probability of a different outcome if the witnesses had testified. Respondent's Exhibit 9, pp. 4-5. Respondent also contends that petitioner's claim regarding the co-defendant was raised as a claim of ineffective assistance of defense counsel for not calling the co-defendant, not as a claim that the trial court would not allow the co-defendant to testify. Respondent's Exhibit 7, p.9.

Although petitioner specifically cited to the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution in his brief on appeal and argued that the denial of the continuance violated due process, Respondent's Exhibit 7, p.7, the Court concludes that petitioner's due process claim in Ground 6 was not "fairly presented" concerning the denial of a continuance because the state court's ruling was based on petitioner's failure to comply with Rule 24.10. See Hall v. Delo, 41 F.3d 1248, 1249-50 (8th Cir. 1994) (federal claim was not fairly presented to state courts when state court declined to decide federal claim on merits because petitioner violated a state procedural rule). The Missouri Court of Appeals rejected petitioner's claim because it was not made in writing and because it was not supported by the factual showing required by Rule 24.10.

As the Missouri Court of Appeals has noted, moreover, petitioner has failed to demonstrate that "the testimony of the absent witnesses [all family members] was so crucial that it is reasonably probable a different outcome would have resulted" even if he had established an abuse of discretion by the trial court in denying the continuance. Respondent's Exhibit 9, p.5. See also Respondent's Exhibit 8, pp. 15-17.[3]

Thus, Ground 6(a) is either procedurally defaulted or without merit, and Ground 6(b) is procedurally defaulted. Petitioner has failed to establish legally sufficient cause for his state procedural default and/or actual innocence for the reasons previously discussed regarding Grounds 1-5 and 7.

Accordingly, it is **ORDERED** that:

(1) the petition for writ of habeas corpus is denied;

(2) petitioner's motion for ruling (Doc. No. 14) is granted; and

(3) this case is dismissed with prejudice.

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: APR 19 1999

[3]Not only had eyewitnesses to the murder identified petitioner as the driver of the getaway truck, the victim's sister and her neighbor testified that petitioner came to their apartment complex on the night before the murder looking for the victim. Respondent's Exhibit 1, pp. 443-78. Thus, the state had produced overwhelming evidence that petitioner was in Jackson County on the day of the murder and on the previous night.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

Case No. 98-0074-CV-W-6

FILED
MAY 19 1999
U. S. DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND DENYING PETITIONER LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL AND A CERTIFICATE OF APPEALABILITY

On April 19, 1999, this Court denied petitioner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and Judgment was entered pursuant thereto. On May 12, 1999, petitioner filed a motion for reconsideration of the Court's Opinion and Order entered on April 19, 1999, pursuant to Fed. R. Civ. P. 60(b). On May 14, 1999, petitioner filed a pleading entitled "Notice to Clerk of Court Request to Appeal Judgment of District Court." In his motion for reconsideration, petitioner contends that the Court misread the record because petitioner had submitted the affidavits of his co-defendant as well as three affidavits from his family members in support of his claim that he is actually innocent of the crimes for which he was convicted, but the Court made no reference in the April 19, 1999, Opnion and Order of the co-defendant's affidavit.

A review of the April 19, 1999, Opinion and Order reveals that, as argued by respondent, petitioner had raised his claim concerning his co-defendant's proposed testimony as an ineffective assistance of defense counsel claim for failing to call the co-defendant in his Rule 29.15 motion, not as a trial court error as he does in his federal petition. In any event, this Court addressed petitioner's Ground 6(b) and concluded that Ground 6(b) was procedurally defaulted.

Document # 20 "C"

As to petitioner's affidavits of his family members, the Court concluded that they were not "newly discovered evidence" because they were discoverable at the time of petitioner's direct appeal and /or state post-conviction proceedings. The transcript of the sentencing proceedings, Respondent's Exhibit 4,pp. 10, 13-16, demonstrates in a similar manner that the information contained in Reginald Rhodes' affidavit was available to petitioner in his state court proceedings. Petitioner's trial counsel stated at the sentencing hearing that he did not call petitioner's co-defendant to testify at trial because the co-defendant would have had little credibility with the jury (especially because several eyewitnesses to the murder identified petitioner as the driver of the getaway truck). Respondent's Exhibit 4, P. 16.

Given the questionable veracity of Reginald Rhodes' affidavit, petitioner has not demonstrated that no reasonable juror would have convicted him in light of new reliable evidence of his actual innocence which was not presented at trial, Schlup v. Delo, 513 U.S. 298, 326-38 (1995), and which was not discoverable at the time of trial through due diligence. See Meadows v. Delo, 99 F.3d 280. 282-83; Bowman v. Gammon, 85 F.3d 1339, 1342 (8th Cir. 1996), cert. denied, ___U.S. ___, 117 S.Ct. 1273 (1997) (standard for gateway claims of actual innocence as to guilt phase issues).

As to petitioner's notice of appeal, under 28 U.S.C. § 1915, an appeal in forma pauperis may be permitted if an affidavit including a statement of all assets possessed and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. See Fed. R. App. P. 24(a). If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith. Blackmun, In Forma Pauperis Appeals, 43 F.R.D. 343 (1967).

Further, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court

unless a district judge or a circuit judge issues a certificate of appealability. Fed. R. App. P. 22(b). A certificate of appealability will be issued only if the applicant has made a substantial showing of the denial of a constitutional right and will indicate which specific issue or issues satisfy the showing required. 28 U.S.C. § 2253(c)(2) and (3).

Because petitioner has not stated any basis for overturning the April 19, 1999, Opinion and Order, in Doc. No. 19, this case presents issues which are not deserving of appellate review under the above standards.

Accordingly, it is **ORDERED** that:

(1) petitioner's motion for reconsideration pursuant to Fed. R. Civ. P. 60(b) (Doc. No. 18) is denied; and

(2) a certificate of appealability and leave to proceed in forma pauperis on appeal are denied.

Howard F. Sachs

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated MAY 19 1999

EXHIBIT #2

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs. Case No: 98-0074-CV-W-8-P
MIKE KEMNA,
Respondent.

AFFIDAVIT OF LAURA LEE

I LAURA LEE, being truly sworn, states under oath as follows:

1. My name is Laura Lee. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge. At all time pertinent hereto, I was a resident of California, until recently, I moved to Dallas, Texas with my parents.

2. I know for a fact that Remon didn't have anything to dowith shooting anyone on August of 1992, because Remon was in California, we hadn't seen him in so long that when he came to see us we didn't want him to leave, cause it wasn't no telling when we would see him again. I know he got to California in July for all the birth-day parties we celebrate together including his own. We all picked him up from the airport cause we were all so happy to see him. I begged Remon to stay for the Holloween party in 1992. So I know he was in California from July 1992 until October 1992 because it was my house he was staying at. So I knew personally when he came and left. We went all the way to Missouri to testify, they took statements from us and everything. Then those people in Missouri told us we could leave because OUR TESTIMONY would not be needed until the next day. Then they went on without US. Had Us travel all that way for nothing. It ain't right. Remon might have done some things but he ain't guilty of no crime in August of 1992.

I, Laura Lee, hereby certify tht the above facts are true and correct.

Subscribed and sworn to before me this 5 day of ~~January~~ February 1998.

Laura Lee
Laura Lee

Norma Jean Burkins
Notary Public

Dated: February 5, 1998

Norma Jean Burkins
Commission Expires
April 5, 1999

"F"

EXHIBIT # 3

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs.
MIKE KEMNA,
Respondent.

Case No: 98-0074-CV-W-8-P

AFFIDAVIT OF GLADYS EDWARDS

I GLADYS EDWARDS, being truly sworn, states under oath as follows:

1. My name is Gladys Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was a resident of and at: 1521 Joanne Ct., Oxnard, California, 93030-3428. The pertinent time in question being, July until October of 1992. [Oxnard, referred to as Ventura].

3. The other pertinent part being February of 1994. My personal knowledge as follows:

1st, I have never had any exposure to any of my sons past court dealings. I know my boy has had trouble with the law in the past, although I'm not certain what the exact nature of that trouble has been, other than he went to prison.

2nd, In 1992, I know my boy was released from prison and he promised he would come to see Me [his mother], by his birthday which is July around the same time as two (2) other family members. So we usually hold a family reunion to celebrate the combined birthdays. I say usually meaning my son has been absent from the past few, due to his confinement. In July 1992, my son Remon Lee, kept his promise to make it to California for the Reunions, I was present when Remon was picked up from the airport in California, July of 1992. I further know that he was in California, all the way to October 1992, because we begged him to stay for Holloween.

"G"

3rd, When I heard the boy was in trouble, that he was accused of committing a crime August of 1992. I knew in my mind this time, the accusation was false because the boy [meaning Remon Lee, Petitioner] was in California with the family. So although I never involved myself in his court affairs in the past. My husband, daughter, and myself traveled from California, all the way to Kansas City, Missouri. For the purpose of testifying at the trial of Remon. So the people would know THE TRUTH. The boy was not involved this time. He was in California and we could vouch for him.

Finally, while we [meaning: myself, husband & daughter] were at the courthouse in Kansas City, Mo. a man who identified himself as an officer, told us that the Judge and prosecutor needs him to take a statement from us so they will know what our testimony will be and so there will be a record of our statements. So we gave a statement.

Another officer of the court told us that we will not be allowed to sit in the court-room whild the trial is going on because we are to testify and can't hear what the other witnesses are saying. So we had to remain in separate room. The officer of the court was allfull nice. He would check on us to see if We needed anything, coffee, restroom ; At one point while we were back and forth to the courthouse, it seems like the 3rd day. While we were in the separate room, the officer of the court came and told us that the prosecutor stated that the states case will again take up the re-mainder of that day. That Our testimony will not be needed until the following day, that we could leave until the following day. He [the court officer] told Us not to worry, the Judge knows We came to testify, they have Our statements, and the trial will not be over until we testify. So at those instructions we left. Later we found out, they went on without Us and finished the trial early, so We didn't know what to do after traveling all that way at our own expense, then not being allowed to do what we came to do.

I, Gladys Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 5 day of February 1998.

Norma Jean Burkins
Notary Public

Dated: February 5 1995

Gladys Edwards
Gladys Edwards
7418 Woodspan Dr.
Dallas, Texas 75232

Norma Jean Burkins
Commission Expires
April 5, 1999

Exhibit #4

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs
MIKE KEMNA,
Respondent.

Case No: 98-0074-CV-W-8-P

AFFIDAVIT OF MINISTER JAMES EDWARDS

I MINISTER JAMES EDWARDS, being truly sworn, states under oath as follows:

1. My name is James Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was and still is a Minister. I was a resident in California, in 1992 and 1994. I have recently moved to Dallas, Texas. My present address is: 7418 Woodspan Dr., Dallas, Texas 75232.

3. In February of 1994 my wife and I along with daughter, traveled to Kansas City, Mo. to testify at the trial of my wife's son [Remon Lee]. I gave a statement to a police officer with the Kansas City, police department that, Remon Lee was in California from July until October of 1992. I know this because I was the driver of the car that picked the boy up from the airport in California, and was the driver that took the boy back to the airport when he left California. I was willing to testify to this and this is why we traveled from California for the trial. Further, it is True that while at the Courthouse, we were told by an officer of the court that Our testimony would not be needed until the following day, we were excused until then. We did not travel from California to abandon the boy, we came to testify.

I, Minister James Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 9 day of ~~January~~ February 1998.

Norma Jean Burkins
Notary Public

Dated: February 9, 1998

James Edwards

Norma Jean Burkins
Commission Expires
April 5, 1999

"H"

Exhibit #1

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs
MIKE KEMNA,
Respondent.

Case No. 98-0074-CV-W-8-P

AFFIDAVIT OF REGINALD RHODES

Reginald Rhodes, being truly sworn, states under oath as follows:

1. My name is Reginald Rhodes. I am over 21 years of age, and am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was charged with the death of STEVE SHELBY: that occurred on or about August 27, 1992, and have personal knowledge to the events concerning the death of Mr. Shelby and the conviction of REMON LEE,[in question].

3. I Reginald Rhodes was identified as the shooter [principal], by an eyewitness. I pled guilty to the shooting death of Mr Shelby, as the lone shooter. I was willing to testify at the evidentiary hearing and the trial of Mr Remon Lee, that:

> He was not present, nor involved in the shooting death of Mr Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not.

4. I was told by my attorney that Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime he was not involved in. He even got more time than I [Reginal Rhodes got].

5. I wish to set the record straight, and testify that Remon Lee is innocent.

I, **Reginald Rhodes**, hereby certify that the above facts are true and correct, I have not been coerced in any way, and I am signing this under my own free will.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me this 15 day of January, 1998.

Reginald Rhodes 500710
Reginald Rhodes 500710
Jefferson City Correctional Center
P.O. Box 900
Jefferson City, Mo. 65102

Notary Public

Dated: 1-15-98

NOTARIAL SEAL
NOTARY PUBLIC STATE OF MISSOURI
MONTEAU COUNTY
MY COMMISSION EXP OCT 1 2000

"I"